

The opinion in support of the decision being entered today was *not* written for publication in and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DOUGLAS M. JENNINGS

Appeal No. 2007-0064
Application No. 09/696,458
Technology Center 3600

HEARD: February 8, 2007

Decided: March 9, 2007

Before, TERRY J. OWENS, MURRIEL E. CRAWFORD, and STUART S. LEVY
Administrative Patent Judges.

TERRY J. OWENS, *Administrative Patent Judge.*

DECISION ON APPEAL

The appellant appeals from a rejection of claims 26-44 and 52-61, which are all of the pending claims.

THE INVENTION

The appellant claims a vehicle dashboard bezel and a method for using it to add an instrument to a vehicle. Claim 33 is illustrative:

33. An after-market dashboard bezel, comprising:
a body configured to be mounted in a bezel mounting space defined between a dashboard housing and an instrument cluster assembly of a vehicle;
and
an instrument mount secured to said body.

THE REFERENCE

Auto Meter Gauge Works flyer, "New for '99" (Auto Meter Products, Inc., undated).

THE REJECTION

Claims 26-44 and 52-61 stand rejected under 35 U.S.C. § 102(a) as being anticipated by the Auto Meter flyer.

OPINION

We reverse the aforementioned rejection.

35 U.S.C. § 102 states, in relevant part:

A person shall be entitled to a patent unless –

(a) the invention was ... patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent....

The appellant argues that the examiner has not established that the Auto Meter flyer met the requirements of a printed publication prior to the appellant's

invention on or before May 26, 2000 (brief, pages 8-10).¹ The appellant relies upon a letter from Thomas F. Bergert, counsel for Gauge Works (named on the Auto Meter flyer), wherein Mr. Bergert states that “[w]ith regard to the statement on the flyer, ‘Available in June’, our client believes this statement indicated that the product was to become available in June, 2000” (reply brief, page 4).

The examiner argues that “the flyer provided by Auto Meter Products is proper prior art, and was submitted in good faith, in response to a proper query by the Examiner” (answer, page 6). The examiner has not provided evidence that the Auto Meter flyer was submitted in good faith. The examiner argues that the examiner’s query to Auto Meter Products to obtain the flyer was proper under 37 CFR § 1.105(a)(1)(i)-(vii) (answer, page 6). As correctly pointed out by the appellant (reply brief, page 3), that rule authorizes the examiner to require submission of information from individuals identified under § 1.56(c) or any assignee. The examiner has not identified the person contacted at Auto Meter Products to obtain the flyer, let alone establish that the person is identified under § 1.56(c) or is an assignee and, therefore, has a duty of candor to the Patent and Trademark Office.

¹ The invention date is based upon a Rule 131 declaration by Douglas M. Jennings filed April 21, 2003.

Moreover, to establish that a reference is a printed publication the examiner must show that the reference has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it. *In re Wyer*, 655 F.2d 221, 226, 210 USPQ 790, 794 (CCPA 1981), quoting *I.C.E. Corp. v. Armco Steel Corp.*, 250 F.Supp. 738, 743, 148 USPQ 537, 540 (SD NY 1966). The examiner argues that “[i]t is clear that the flyer was clearly intended, and utilized, as part of a mass mailing to their customers since it promoted its booth at the SEMA Convention in 1999 (as indicated at the bottom of the flyer)” (answer, page 6). The bottom of the flyer states: “Stop by our Booth at SEMA, to see our new products!”. There is no statement that the SEMA booth was at a 1999 convention. If Mr. Bergert is correct that “Available in June” on the flyer refers to June 2000, then the SEMA show referred to at the bottom of the flyer may be a 2000 show. The examiner has not shown that the Auto Meter flyer was disseminated or otherwise made available to anyone prior to the appellant’s invention, let alone being made available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it.

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The examiner, therefore, has not established that the reference relied upon in rejecting the appellant's claims is prior art. Accordingly, we reverse the examiner's rejection.


DECISION

The rejection of claims 26-44 and 52-61 under 35 U.S.C. § 102(a) over the Auto Meter flyer is reversed.

REVERSED

Terry J. Owens
TERRY J. OWENS
Administrative Patent Judge


MURRIEL E. CRAWFORD
Administrative Patent Judge


STUART S. LEVY
Administrative Patent Judge

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